INDEX

	Page
Petition for writ of certiorari	1-11
Summary statement	2
Statement of jurisdiction	8
Questions presented	9
Reasons relied on for allowance of writ	10
Prayer for writ	11
Brief in support of petition	12-32
Opinion of the court below	12
Jurisdiction	13
Statement of the case	13
Specification of errors	13
Argument in support of petition	14
Specification of Error No. 1	14
Specification of Error No. 2	15
Specification of Error No. 3	20
Specification of Error No. 4	22
Specification of Error No. 5	30

TABLE OF AUTHORITIES CITED

Cases Cited

Page

Andrews v. City of Winter Haven, 148 Fla. 144, 3 So. 2d 805 26

Cochran v. M & M Transp. Co., 110 F 2d 519 26

Deauville Corporation v. Garden Suburbs Golf and Country Club, Inc., 164 F. 2d 430 6

Deauville Corporation v. Macfadden, et al., 155 Fla. 898, 21 So. 2d 907 3

Deposit Bank of Frankfort v. Board of Councilmen of the City of Frankfort, 191 U. S. 499, 24 S. Ct. 154, 48 L. Ed. 276 ..... 15, 19

Doggett v. Deauville Corporation, et al., 148 F. 2d. 881 32

Donald v. J. J. Lumber Co., 68 F. 2d 441 22

Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817 23

Fidelity & Deposit Co. v. Port of Seattle, 106 F. 2d 777 25

Garden Suburbs Golf and Country Club, Inc., v. Deauville Corporation, 156 Fla. 825, 24 So. 2d 898 5

Garden Suburbs Golf and Country Club, Inc. v. John M. Murrell and D. H. Redfearn, as Receivers of Deauville Corporation, 180 F. 2d 435 ..... 8, 12, 22

TABLE OF AUTHORITIES CITED — Continued

Cases Cited

	Page
Gillespie v. Commissioner of Internal Revenue, 151 F. 2d 903	21
Helvering v. Hallock, et al., 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 382, 125 A.L.R. 1368	24
Horse Creek Coal Land Co. v. Alderson, et al., 266 Fed. 477	22
In Re Bair, 49 Fed. Supp. 56	23
Kauffman and Baer v. Monroe Motor Line, 124 Pa. Super. 27, 187 A. 296	23
Meredith, et al. v. City of Winter Haven, 320 U.S. 228, 64 S. Ct. 7, 88 L. Ed. 9	26
Meredith, et al. v. City of Winter Haven, 134 F. 2d 202	27
McIntosh v. Wiggins, 123 F. 2d 316	19
Outman v. Cane, 141 Fla. 196, 192 So. 611	26
Perry v. Wiggins, 57 F. 2d 622	19
Raphiel v. Morris Plan Industrial Bank, 146 F. 2d 340	25
Reed, et al., v. Allen, 286 U. S. 191, 52 S. Ct. 532, 76 L. Ed., 1054, 81 A.L.R. 703	19
State v. Spec. Tax School Dist., 143 Fla. 557, 197 So. 127	26

Cases Cited

Page

Taylor v. Williams, 142 Fla. 402, 195 So. 175 26

U. S. v. State of Minnesota, 113 F. 2d 770 24

Wiggins v. Perry, 271 S. W. 815 19

Statutes Cited

Judicial Code 1254 (1) Title 28, United States Code Section 1254 (1), Pub. L. No. 773, 80th Cong., 2d Sess., 1254 (1), June 25, 1948 8

SUPREME COURT OF THE UNITED STATES

OCTOBER 1949 TERM

No......

GARDEN SUBURBS GOLF AND COUNTRY CLUB, INC.

Petitioner,

vs.

JOHN M. MURRELL and D. H. REDFEARN, as RECEIVERS OF DEAUVILLE CORPORATION,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To Honorable Fred M. Vinson, Chief Justice of the United States, and the Honorable Associate Justices of the Supreme Court of the United States:

Petitioner, Garden Suburbs Golf and Country Club, Inc., respectfully shows this Court:

I.

SUMMARY STATEMENT

Respondent, as lessor, by instrument dated June 14, 1935 (R. 7) let to Petitioner, as lessee, property at Miami Beach, Florida, which is particularly described in the lease. (R. 7)

At the end of the first year of the lease term, and annually thereafter, the Petitioner-tenant engaged the services of one Frank A. Lohmann, Certified Public Accountant, to audit its books, as required by Paragraph 12 of the lease, a copy of each audit being delivered to the Respondent-landlord and rent being paid upon the basis of such audits (Supp. R. 24, 77, 78, 79). Each of the said audits reveals the moneys received BY the Petitioner FROM its subtenants and concessionaires, and those amounts are included in the Petitioner's gross income upon the basis of which the amount of rent was computed. All during the first six years of the term the audits referred to and rents were accepted by the landlord without objection (Supp. R. 23, 24, 78, 79).

At or about the end of the sixth year of the term, the Respondent-landlord for the first time objected to the interpretation of Paragraph 11 of the lease upon which the audits by Certified Public Accountant, Frank A. Lohmann, were based, the landlord contending that the income received BY the sub-tenants and concessionaires FROM the operation of their respective businesses must be included in the computation of the Petitioner-tenant's gross income upon which the rents are to be computed, instead of the income received BY the Petitioner tenant FROM its sub-tenants and concessionaires.

The Petitioner-tenant refused to agree with the Respondent-landlord's proposed new interpretation of the lease. Whereupon, the landlord instituted a long series of litigation, of which this case is a part.

The Respondent-landlord, as complainant, exhibited its amended bill of complaint in the Circuit Court for Dade County, Florida in Chancery Case #71067 on September 23, 1941 (Supp. R. 49-66) questioning therein the correctness of the audits made by Frank A. Lohmann, Certified Public Accountant, and seeking judicial approval of the landlord's then contended interpretation of the lease, simultaneously seeking cancellation of the lease because of the Petitioner-tenant's refusal to agree with that interpretation. Answer was filed by the Petitioner as Defendant (Supp. R. 66-74). The cause was referred to a Special Master for the taking of testimony, upon which the Master's report was filed (Supp. R. 75-87) and thereafter, final decree in favor of the tenant was entered April 27, 1944 (Supp. R. 87-93). The Respondent-landlord appealed to the Supreme Court of Florida from the final decree in Chancery Case #71067, which appeal was dismissed on motion of the Appellant therein. See Deauville Corporation vs. Macfadden, et al. 155 Fla. 898, 21 So. 2d 907.

On May 12, 1942, while Circuit Court Chancery Case #71067 was pending, the Respondent-landlord instituted Case #680-M Civil in the United States District Court for the Southern District of Florida, Miami Division, against the Petitioner-tenant, seeking the same relief which was sought in Chancery Case #71067. On May 16, 1944, shortly after the entry of a final decree in Chancery Case #71067, the District Court entered its order dismissing District Court Case #680-M Civil, recognizing and

accepting the State Court decree in Chancery Case #71067 as the law of the case, but withholding dismissal "with prejudice" pending the outcome of the appeal from that final decree, then pending in the State Supreme Court. Thereafter, on October 19, 1944, upon exhibition of a certified copy of the Florida Supreme Court's order dismissing the appeal from the final decree in Case #71067, an amended summary judgment was entered in District Court Case #680-M Civil, accepting and approving the decree in Chancery Case #71067 as res judicata of the question there involved and dismissing the case "with prejudice" (R. 675, 677; Supp. R. 25, 26).

On September 21, 1944, the landlord exhibited its bill of complaint in the Chancery Court for Bergen County, New Jersey, complaining against the Petitioner-tenant and seeking the same relief that it had unsuccessfully sought in Chancery Case #71067, as well as in United States District Court Case #680-M Civil (Supp. R. 26, 27; R. 132-204).

Within a week, on September 27, 1944 the tenant, seeking relief from continuous litigation based upon the same facts, exhibited its bill of complaint in the Circuit Court of Dade County, Florida in Chancery Case #87418, seeking therein to enjoin the Respondent-landlord from further molesting the tenant with litigation over questions which had been finally and definitely determined by judicial decrees. In that bill of complaint the decree entered in Chancery Case #71067 as well as the judgment of the United States District Court in its Case #680-M Civil were pleaded as the basis upon which the injunctive relief was sought (Supp. R. 27). Certified copies of the proceedings, both in Case #71067 and #680-M Civil, were ex-

hibited and introduced in evidence before the Master by the complaining tenant (R. 223). The Defendant (Respondent here) in Case #87418, by its answer, admitted that the decree in Case #71067 was res judicata of the proper interpretation of the lease for all purposes during the first six years of the term (Supp. R. 28, 94-102). Thereafter, the Chancellor, before whom Case #87418 came on for final hearing, in direct violation of the principles of res judicata and estoppel in pais, entirely ignored the decree of another Chancellor of the same Court, entered in Case #71067, as well as the summary judgment of the United States District Court entered in Case #680-M Civil, as well as the Defendant-landlord's admission that the decrees referred to properly interpreted the lease and without factual basis therefor either allegata or probata, entered a decree radically changing the interpretation theretofore mutually followed by the parties and approved by judicial decree (R. 233-241).

Upon appeal from the decree in Case #87418 the Supreme Court of Florida likewise ignored the former adjudications, approving and affirming in part the Chancellor's arbitrary interpretations of the lease. Garden Suburbs Golf and Country Club, Inc., vs. Deauville Corporation, 156 Fla. 825, 24 So. 2d 898, (R. 991). The Florida Supreme Court reversed the decree in Case #87418 in some of its material respects and remanded the case to the trial court for the entry of a new decree, which new decree was not entered until December 27, 1949 (R. 998), long after the entry of the final decree in the instant case (R. 943) on December 2, 1948.

Without securing the entry of a new decree pursuant to the mandate of the Florida Supreme Court, the Land-

lord-Respondent on October 29, 1946, instituted Case #1825-M Civil in the United States District Court for the Southern District of Florida, Miami Division, seeking cancellation of the lease and possession of the premises. (Supp. R. 1)

By order of dismissal dated May 28, 1947 (Supp. R. 270) the District Court dismissed the Case #1825-M Civil because of insufficiency of the allegations in the bill of complaint as the basis of a forfeiture and insufficiency of the demands and notices required in connection therewith, such dismissal being "with prejudice".

Upon appeal to the United States Court of Appeals for the Fifth Circuit taken by the Plaintiff in that cause (Respondent here), as reported in Deauville Corporation vs. Garden Suburbs Golf & Country Club, Inc., 164 F. 2d 430, rehearing denied 165 F. 2d 431, the Court agreed that the demands and notices made by the Plaintiff were insufficient but remanded the case for trial on its merits. Thereafter this Court denied certiorari in 33 U. S. 881, 68 S. Ct. 912.

On December 12, 1946 the landlord instituted the instant Case, #1861-M Civil in the United States District Court for the Southern District of Florida, Miami Division, seeking collection of rents alleged to be due and unpaid for the fiscal years of 1943-1944, 1944-1945 and 1945-1946, as such rents would be payable upon the basis of the interpretation of the lease made by the decree in Case #87418 (R. 1) and the decision of the Supreme Court of Florida (R. 991), in excess of the rent revealed by the audits made upon the basis of the interpretation of the lease approved and adopted by the decree in Case #71067, which decree

was in turn adopted as the law of the case by the summary judgment entered in United States District Court Case #680-M Civil. The Defendant-tenant (Petitioner) moved to dismiss the complaint because of the insufficiency of its allegations (R. 15). This motion was denied (R. 19). The Defendant-tenant then exhibited its answer, contending that the decrees in Case #71067 and #680-M Civil were controlling as to the interpretation of the lease, exhibiting the pleadings and records in Case #71067 with its answer, as well as the pleadings and records in subsequent litigation between the same parties, setting forth in detail the manner in which the Defendant-tenant had performed its obligations pursuant to the lease, including payments of all rents accruing according to the audits made by Certified Public Accountant Frank A. Lohmann, which audits were the basis upon which the interpretation of the lease was made in Case #71067 (R. 20-248). The Plaintiff-landlord (Respondent) moved to strike the major portions of this answer, including all reference to the decree in Case #71067 as well as all allegations or facts supporting the defenses of estoppel, payment, accord and satisfaction, however factually pleaded (R. 249-260). This motion to strike portions of the answer was granted (R. 265-266). On final hearing, a final decree was entered adopting the decree in Case #87418, or so much thereof as was affirmed by the Supreme Court of Florida as the law of the case, and granting judgment against the Defendant-tenant in the sum of $81,949.42, plus costs (R. 943-944). Appeal to the Court of Appeals for the Fifth Circuit was taken forthwith from the final decree and the order denying the Defendant-Petitioner's motion for a new trial (R. 964).

On December 16, 1948 the Court consolidated the Case #1825-M Civil with Case #1861-M Civil (the instant case).

The record in the former is designated as the Supplemental Transcript of Record.

Thereafter on December 30, 1948 the District Court entered its order allowing State Court pleadings to be filed (R. 969). The decree of the State Circuit Court in Case #87418 (R. 999), entered December 27, 1949, pursuant to the decision of the Florida Supreme Court (R. 991), was exhibited of record in the District Court, that decree not having been entered at the time of the final decree in the instant case and having been entered as appears therefrom, some ten days after this case was on appeal to the Court of Appeals for the Fifth Circuit, and after the final decree had been entered in the instant case.

The Court of Appeals affirmed the final decree of the District Court by its opinion and judgment filed February 27, 1950 (R. 1351). On April 5, 1950 the Petitioner filed its petition for rehearing (R. 1357), which petition was denied on the same day (R. 1365).

II.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked under §1254 (1) of the Judicial Code, Title 28, United States Code, Section 1254(1), Pub. L. No. 773, 80th Cong., 2d Sess., §1254 (1), June 25, 1948.

The judgment of the Court of Appeals sought to be reviewed was rendered February 27, 1950 (R. 135), and a petition for rehearing was filed on April 5, 1950 (R. 1357), which petition was denied on the same day (R. 1365). See 180 F. 2d 435.

III.

QUESTIONS PRESENTED

1. Where a final decree entered by a State Court of competent jurisdiction, is adopted as res judicata by a United States District Court, in a Case between the same parties involving the same question growing out of the same subject matter, can the same United States District Court, in a subsequent case, abandon and ignore its prior judgment of adoption and follow a decree entered in the same State Court, in a later case, between the same parties involving the same question growing out of the same subject matter, which later State Court decree materially differs from the first State Court decree which had been adopted by the United States District Court?

2. Which of the two interpretations of the lease here involved, is the proper and controlling interpretation to be used in tabulating the percentage rents to be paid by the tenant, that one made and approved by the decree in Case #71067 and adopted by the District Court's summary judgment in Case #680-M Civil or that interpretation made and approved by the decree in Case #87418, subsequently entered, which decree was affirmed in part and reversed in part on appeal therefrom, and never completed until long after the present case was concluded?

3. Must the Courts of the United States blindly and without reason follow the decisions of State Courts and must the Court in this case follow the State Court decision regardless of all other considerations?

4. Does the evidence support the allegations of the complaint?

5. Did the tenant, by its bill of complaint, in Circuit Court Chancery Case Number 87418, in any manner, waive the benefits accruing to it under the final decrees in Circuit Court Case #71067 and United States District Court Case #680-M Civil?

6. Did the District Court, by its order dated December 27, 1948, allowing the Respondent to file in the record matters of evidence arising subsequent to the entry of final decree and without affording a hearing to the Petitioner, deny the Petitioner due process of law?

IV.

REASONS RELIED ON FOR ALLOWANCE OF WRIT

1. The Court of Appeals has decided an important question of local law in a way probably in conflict with applicable local decisions.

2. The Court of Appeals has so far sanctioned a departure from the accepted and usual course of judicial proceedings by a lower court as to call for an exercise of the United States Supreme Court's power of supervision.

3. The Court of Appeals has not given proper effect to an applicable decision of the United States Supreme Court.

4. The matter presented is of great public interest in the application of the doctrine of res judicata, with particular reference to the force and effect given decisions and judgments of Federal Courts in State Courts, as well as the force and effect required to be given by Fed-

eral Courts to their own earlier decisions and decrees and the judgments of State Courts.

V.

PRAYER FOR WRIT

A certified transcript of the record of the case in the Court of Appeals is exhibited herewith, and made a part hereof, in compliance with Rule 38 of this Court.

Wherefore, your Petitioner prays that a Writ of Certiorari may issue out of and under the Seal of the United States Supreme Court, directed to the United States Court of Appeals for the Fifth Circuit, commanding the said United States Court of Appeals for the Fifth Circuit to certify and send up to this Court a full and complete transcript of the record and proceedings of the said Court of Appeals in the Case #12651 and entitled Garden Suburbs Golf and Country Club, Inc., Appellant, versus John M. Murrell and D. H. Redfearn, as Receivers of Deauville Corporation, Appellees, to the end that the said cause may be reviewed and the manifest errors of such court be revised and corrected as provided by law; that upon the hearing by this Court, the judgment below be reversed, and such further proceedings be held herein as may be provided by law.

A. FRANK KATZENTINE,

Attorney for Petitioner,
924 duPont Building,
Miami 32, Florida.

SUREME COURT OF THE UNITED STATES

OCTOBER 1949 TERM

No......

GARDEN SUBURBS GOLF AND COUNTRY CLUB, INC.,

Petitioner,

vs.

JOHN M. MURRELL and D. H. REDFEARN, as RECEIVERS OF DEAUVILLE CORPORATION,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR CERTIORARI

I.

The Opinion of the Court Below

The opinion of the Court of Appeals, rendered February 27, 1950 is reported in 180 F. 2d 435.

II.

Jurisdiction

The jurisdiction of this Court is invoked under Title 28, United States Code, Section 1254 (1), providing for review by writ of certiorari of cases in the courts of appeals.

III.

Statement of the Case

The nature of the case, the underlying background and the decision of the Court of Appeals for the Fifth Circuit are set forth in the foregoing petition, to which reference is made in the interest of brevity.

IV.

Specification of Errors

The Court of Appeals erred in the matters following:

1. In affirming the final judgment of the District Court.

2. In holding that the adjudications severally by the State Circuit Court in chancery case No. 71067 and the United States District Court in case No. 680-M-Civil were not res judicata of the issues before the District Court in this cause.

3. In holding that the Petitioner as Plaintiff in the State Circuit Court, chancery case No. 87418 had failed to plead the decree in chan-

cery case No. 71067 and District Court case No. 680-M-Civil, as res judicata of the issues in said case No. 87418.

4. In holding that the Petitioner's answer stricken by the District Court did not present a defense.

5. In denying the Petitioner's Petition for Rehearing.

V.

Argument in Support of Petition
Specification of Error No. 1

The specification of error No. 1 must appear as a composite of the remaining specifications; therefore, reference to the argument supporting the remaining specifications is made in support of the error first assigned, with some additional argument. The complaint (R 1) is founded wholly upon the final decree in case No. 87418 as it then existed (R 233) and the opinion of the Supreme Court of Florida (R 991) based upon the appeal taken from that decree.

The opinion of the Supreme Court of Florida did not require anything relative to the payment of monies, but it did grant the parties permissive right to seek an accounting if they might so desire upon supplemental proceedings, thereupon, the court affirmed in part and reversed in part the decree appealed from "with directions that a decree be entered in accordanc with this opinion". No such decree was entered until December 27, 1948 (R 998) long after the entry of the final decree complained

of in this cause, which latter decree was entered December 2, 1948.

It must, therefore, appear that the final judgment entered by the District Court and affirmed by the Court of Appeals were and are based upon conditions and causes of action which did not exist at the time of the entry of that judgment and therefore do not form a proper foundation for the judgment.

Specification of Error No. 2

The Court of Appeals wholly overlooked or refused to follow the Supreme Court of the United States in its decision in Deposit Bank of Frankfort vs. Board of Councilmen of the City of Frankfort, 191 U. S. 499, 24 S. Ct. 154, 48 L. Ed. 276. In that case, the Board of Councilmen sued the bank in the State Court to recover certain taxes for the years 1892, 1893 and 1894. The bank relied upon the provisions of a certain law of the State of Kentucky known as the "Hewitt Law" as exempting it from the taxes sought to be collected. The Circuit Court of Franklin County sustained the bank's claim of exemption holding that the "Hewitt Law" was an irrevocable contract between the bank and the state. Upon appeal, this judgment was reversed by the Kentucky Court of Appeals which held that the "Hewitt Law" did not constitute such an irrevocable contract.

Between the entry of the State Circuit Court's judgment favorable to the bank and the reversal of that judgment by the Kentucky Court of Appeals, the bank filed suit in the Federal District Court, pleading the State Circuit Court's judgment as res judicata of the issues and

praying that the Board of Councilmen be perpetually enjoined from assessing the proposed taxes against the bank. The Federal District Court accepted the State Circuit Court judgment as res judicata of the issues in granting the relief prayed. When the State Circuit Court's judgment favorable to the bank was reversed by the Kentucky Court of Appeals and the case remanded for a new trial, the bank filed a supplementary answer setting up the Federal Court decree as an estoppel. The State Court held that the Federal Court decree was not an estoppel. Upon writ of error to the United States Supreme Court, the State Court was reversed. The Supreme Court of the United States, among other things, held:

> "It is urged that the state judgment upon which the Federal decree of 1898 is based was afterwards reversed by the highest court of Kentucky, and, therefore, the foundation of the decree has been removed, and the decree itself must fall. But is this argument sound? When a plea of **res judicata** is interposed, based upon a former judgment between the parties, the question is not what were the reasons upon which the judgment proceeded, but what was the judgment itself; was it within the jurisdiction of the court, between the same parties, and is it still in force and effect? The doctrine of estoppel by judgment is founded upon the proposition that all controversies and contentions involved are set at rest by a judgment or decree lawfully rendered which, in its terms, embodied a settlement of the rights of the parties. It would undermine the foundation of the principle upon which it is based if the court might inquire into and revise the reasons

which led the court to make the judgment. In such case, nothing would be set at rest by the decree; but the matter supposed to be finally adjudicated, and concerning which the parties had had their day in court, could be reopened and examined, and if the reasons stated were, in the judgment of the court before which the estoppel is pleaded, insufficient, a new judgment could be rendered because of these divergent views, and the whole matter would be at large. In other words, nothing would be settled, and the judgment, unreversed, instead of having the effect of forever settling the rights of the parties, would be but an idle ceremony."

In answer to the contention that the taxes now sought to be collected were for different years than those covered by the Federal Court decree relied upon, the Court said:

"Again, it is urged that the taxes involved are those for different years than were under consideration and covered by the decree of the Federal court relied upon. The vice of this argument consists in assuming that the taxes for the specific years were alone involved and covered by the decree of the court. The controversy was as to the force and effect of the Hewitt law as a contract; not for one year, but for all years; not for one assessment, but for all assessments of taxes upon certain property of the bank. The contest was over the contract, and the consequent want of power to collect any and all taxes the assessment of which did violence to the contract rights of the bank. The court had jurisdiction of the

> parties and of the subject-matter of the suit, and it was adjudicated that there was a contract which was entitled to protection against impairment by state legislation within the right garanteed by the Federal Constitution. This adjudication necessarily included not only the taxes for specific years, but foreclosed the right to collect any taxes concerning which the contract afforded immunity to the bank."

The fact that the summary judgment in District Court case No. 680-M-Civil was based upon a State court decree does not render it any the less binding as res judicata. This principle of law was definitely settled by the Court in the Frankfort case when it said (24 S. Ct. 162):

> "In our judgment the adjudication of the Federal court relied upon here, although based upon the judgment of a state court, given as a reason therefor, is equally effectual as it would have been had the Federal Court reached the conclusion, as upon the original question, that the Hewitt law constituted a binding contract between the parties. Any other conclusion strikes down the very foundation of the doctrine of **res judicata,** and permits the state court to deprive a party of the benefit of its most important principle, and is a virtual abandonment of the final power of the Federal Courts to protect all who come before them relying upon rights guaranteed by the Federal Constitution, and established by the judgments of the Federal Courts."

This principle of law has been followed whenever the

facts occasion it. In Reed, et al., v. Allen, 286 U. S. 191, 52 S. Ct. 532, 76 L. Ed. 1054, 81 A.L.R. 703, it was recognized in the following language:

> "The rule has been settled for this court that, where a judgment in one case has successfully been made the basis for a judgment in a second case, the second judgment will stand as res judicata, although the first judgment be subsequently reversed."

In McIntosh v. Wiggins, 123 F. 2d 316, (C.C.A. 8th Cir. Oct. 29, 1941, Cert. denied, 315 U. S. 815, 62 S. Ct. 800), the Federal Court of the Eastern District of Missouri, in a case therein pending accepted as res judicata a decree of the Circuit Court of the City of St. Louis construing certain portions of the will of one John E. Liggett, deceased, entered June 22, 1923, and affirmed by the Supreme Court of Missouri, 271 S. W. 815. Thereafter, on July 25, 1941, in another suit between the same heirs, the Supreme Court of Missouri ruled that the challenged portion of the aforesaid decree of the Circuit Court of the City of St. Louis was wrong. In affirming the District Court's refusal to change its original judgment, the Circuit Court of Appeals said:

> "The decision of the Supreme Court of Missouri cannot, **in any event, affect in any way** the binding force and effect of the judgment of the United States District Court in Perry v. Wiggins, which this Court has affirmed (8 Cir. 57 F. 2nd 622) **and which it may not now ignore.** See and compare Deposit Bank v. Board of Councilmen of Frankfort, 191 U. S. 499, 24 S. Ct. 154, 48 L. Ed. 276." (Emphasis supplied).

The pertinent principles of law enunciated in Deposit Bank v. Frankfort, Supra, have been steadfastly followed and respected since the date of that decision, except only in the opinion of the Court of Appeals rendered in the instant case.

Specification of Error No. 3

The third assignment or specification of error is directed to the Court of Appeals, finding and holding "in seeking in this suit to plead as a bar to the Hunt decree, the earlier Wiseheart decree and the judgment of the Federal Court based on it, neither of which were pleaded in the second state court suit, the appellant found itself below, it finds itself here, in the impossible position of seeking, contrary to the settled doctrine of the cases, to plead, as a bar to a later judgment between the same parties, an earlier judgment which was not pleaded as a bar in the later suit".

The Hunt decree referred to by the Court of Appeals is the decree in case No. 87418. The Wiseheart decree is the decree in case No. 71067 and the judgment of the Federal Court also referred to is the judgment in District Court case No. 680-M-Civil, all of which more fully appears from the statement of fact set forth in the petition herein, as well as the statements made by the Court of Appeals in its opinion.

The Bill of Complaint in case No. 87418 (R 975-976) reveals that in the paragraph numbered eight of the Bill of Complaint, the Plaintiff, Petitioner here, pleaded fully the force and effect of the decree in chancery case No. 71067 and in the next succeeding paragraph numbered

nine thereof pleaded the existence, force and effect of the judgment in District Court case No. 680-M-Civil. The answer filed by the Defendant in case No. 87418 (R 205) admitted the allegations of the paragraphs numbered eight and nine of the Bill of Complaint with respect to the decree in chancery case No. 71067, as well as the judgment in District Court case No. 680-M-Civil.

The Special Master's report in case No. 87418 (R 223) shows that a certified copy of the proceedings in each the chancery case No. 71067 and the District Court case No. 680-M-Civil were introduced into evidence before the Special Master.

In Gillespie v. Commissioner of Internal Revenue, 151 F. 2d. 903, (certiorari denied 66 S. Ct. 1014, 328 U. S. 839, 90 L. Ed. 1614, rehearing denied 66 S. Ct. 1363, 328 U. S. 880, 90 L. Ed. 1648) (p. 907) the Court said:

> "(5) The contention is also made that the Tax Court erroneously admitted the proceedings in the former case in support of the plea of estoppel. **It is argued** in effect **that since the judgment was not attached to the affirmative plea, but pleaded by reference to the docket number,** and no proof of finality offered, **it was not pleaded and proven with sufficient certainty. We think,** however, **that the former judgment was sufficiently pleaded,** and certainly the judgment standing alone carries with it the presumption of finality. **We therefore conclude that the judgment in the first case is conclusive of the issues presented here."** (Emphasis Supplied).

The Court of Appeals in its decision reported in 180 F. 2d. 435 cited as authority therefor Donald v. J. J. White Lumber Co., 68 F. 2d 441 and Horse Creek Coal Land Co. v. Alderson, et al., 266 Fed. 477, cases wherein admittedly the prior adjudication was not pleaded in the later case as an estoppel and relied upon by the proponent thereof. Those cases clearly are not applicable to the facts here existing since, as has been noted above, the prior adjudications were pleaded, admitted, proven and relied upon throughout.

Specification of Error No. 4

The fourth assignment or specification of error is directed to the ultimate paragraph in the decision of the Court of Appeals, which decision affirmed the District Court's judgment.

Apparently, the District Court which was followed by the Court of Appeals believed that the courts of the United States must, without exception, blindly and without question, follow the decisions of state courts regardless of all other questions. Therefore, the District Court, by its order entered May 28, 1947 (R 265-266) granted the Plaintiffs' (Respondents) motion to strike portions of the defendant's answer, striking therefrom all of the allegations with reference to defensive matter, particularly those allegations which refer to the decrees in chancery case No. 71067, District Court case No. 680-M-Civil and other defensive matters, believing mistakenly that because a state court had ruled subsequent to the decree and judgment aforesaid, it must blindly follow that later state court decision, whatever the result might be.

It may be anticipated that the respondents here will continue to contend that under the doctrine laid down in Erie Railroad Company v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, the Federal courts are required to recognize, respect and enforce, as unalterable, the decisions of a state court, however poorly founded, even as is the decision of the Supreme Court of Florida in 24 So. 2d 898.

The District Court for the middle District of Pennsylvania having before it in "In Re Bair," 49 Fed. Supp. 56 (March 6, 1943) the question whether or not an encumbrance noted on the certificate of title of a motor vehicle prior to the effective date of a pertinent state statute was a valid lien as against creditors of a bankrupt who was so adjudicated prior to the effective date of the statute. The case of Kauffman and Baer v. Monroe Motor Line Transp., Inc., 124 Pa. Super. 27, 187 A. 296 was cited as a guide or precedent in answering the question. In accepting it for that purpose the District Judge sagely said:

> "We are following the ruling of the Pennsylvania Superior Court in the Case of Kauffman & Baer, supra, not because of the case of Erie R. Co. v. Tompkins, 304 U. S. 64, 58 S. Ct. 817, 82 L. Ed. 1188, 114 A.L.R. 1487, and other cases expressing the extent to which the Federal Courts are bound by the decisions of the State Courts, but because we think the Kauffman & Baer case is a correct interpretation of the law. Decisions of the courts are not the law; they are the evidence of the law. Where decisions correctly present the law they should be followed and if they do not correctly present the law they should not be followed. **Justice cannot be administered by**

blindly following a previous decision of any court without regard for the soundness of the conclusions therein expressed. To act otherwise would be merely to perpetuate errors." (Emphasis supplied)

Mr. Justice Frankfurter, speaking for the Court in a series of cases headed by Helvering v. Hallock, et al., 309 U. S. 106, 60 S. Ct. 444, 84 L. Ed. 382, 125 A.L.R. 1368 (January 29, 1940), warned against the danger of blindly following other decisions in the following language:

> "We recognize that stare decisis embodies an important social policy. It represents an element of continuity in law, and is rooted in the psychologic need to satisfy reasonable expectations. But stare decisis is a principle of policy and not a mechanical formula of adherence to the latest decision, however recent and questionable, when such adherence involves collision with a prior doctrine more embracing in its scope, intrinsically sounder, and verified by experience."

In U. S. v. State of Minnesota, 113 F. 2d 770 (C.C.A. 8th Cir. July 29, 1940), it was held (5) (6):

> "The 'stare decisis doctrine' does not call for a blind, arbitrary and implicit following of precedents, but recognizes, no vested rights nor rule of property being involved, that it is more important as to far reaching judicial principles that the Court should be right rather than it merely be in harmony with previous decisions.

> The 'stare decisis doctrine' is subordinate to legal reason and is properly departed from if and when such departure is necessary to avoid the perpetuation of error."

In Raphiel v. Morris Plan Industrial Bank, 146 F. 2d. 340 (C.C.A. 2nd Cir. Dec. 11, 1944), held (N2):

> "An obviously unsound precedent would be overruled where no one could have relied on it to his detriment except to extent that appellee did in filing specifications to discharge of bankrupt and in asserting its position on appeal which was not deemed sufficient to prevent the overruling of the precedent."

The decree in case No. 87418, as modified by 24 So. 2d 898, is not the law of the Case here.

> "Rulings made in original action on fidelity bond in Washington (State) court were not the 'law of the case' in a subsequent action on the bond commenced in the State Court and removed to the Federal District Court, since the doctrine of the 'law of the case' is confined in its operation to **subsequent proceedings in the same case.**"

Fidelity & Deposit Co. v. Port of Seattle, 106 F. 2d 777, (Oct. 3, 1939).

> "The doctrine of 'law of the case', like the doctrine of 'stare decisis', is not an inexorable command and must not be utilized to accomplish an obvious injustice."

Cochran v. M & M Transp. Co. 110 F. 2d 519 (Mch 22, 1940).

The case which removes any possible doubt concerning the answer to the question before us is Meredith, et al., v. City of Winter Haven, 320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9 (Nov. 8, 1943). Meredith, et al., were holders of City of Winter Haven general refunding bonds, issue of 1933. The City proposed to call the bonds for payment but refusing to pay the deferred or accumulated interest as provided therein. Meredith brought suit in the District Court, Southern District of Florida, for a declaratory decree adjudicating that the City could not do as it proposed, **and an injunction** restraining the City from attempting to do so.

During the pendency of the suit, the case of Andrews v. City of Winter Haven, 148 Fla. 144, 3 So. 2d 805, involving the identical bond issue was decided (Sept. 13, 1941), and in it the Florida Supreme Court held that the "deferred interest coupons" on the bonds were invalid, but severable from the bonds. When the decision in the Andrews case came down the defendant, City of Winter Haven, filed Motion to dismiss the Meredith suit on the ground that the complaint stated no claim for relief, basing its contention on the Andrews case and three other recent Florida decisions (Outman v. Cane, 141 Fla. 196, 192 So. 611; Taylor v. Williams, 142 Fla. 402, 195 So. 175; and State v. Spec. Tax School Dist., 143 Fla. 557, 197 So. 127) which had apparently been the lode stars for the Andrews case. All four of these cases were in conflict with earlier Florida Supreme Court decisions.

Apparently believing that the Erie case made it man-

datory for him to do so, Judge Barker granted the defendant's motion to dismiss on the grounds that the complaint failed to state a cause of action and that the questions of law involved had been determined adversely to the plaintiff by the Supreme Court of Florida (in the Andrews case). On appeal, the Circuit Court of Appeals for the Fifth Circuit (134 F. 2d 202), refused to accept the Andrews case, as the controlling law, agreed with the plaintiffs that the complaint presented a justiciable controversy requiring determination, and that plaintiffs were entitled to a judgment clarifying the then confused status of the applicable law of Florida. It expressed doubt as to what the Florida law, applicable to the facts presented, now is or will be declared to be, and in view of this uncertainty, since no federal question was presented and the jurisdiction was invoked solely on grounds of diversity of citizenship, it thought that the plaintiffs should be required to proceed in the state courts.

On Certiorari, the Supreme Court of the United States (320 U. S. 228, 64 S. Ct. 7, 88 L. Ed. 9) speaking through Mr. Chief Justice Stone, agreed with the Circuit Court of Appeals that the Andrews case was not good law, and, for the purpose of the decision then being made, assumed that the Florida Supreme Court may not follow it in the future. It disagreed with the Circuit Court of Appeals, however, in its conclusion that the Erie case precluded Federal Courts from exercising jurisdiction over cases of the kind then before it, and after reciting various classes of cases in which it would be improper for the Federal Courts to interfere (last column p. 11 and first column p. 12, S. Ct. text), the Court said:

"But none of these considerations, nor any sim-

ilar one, is present here. Congress having adopted the policy of opening the federal courts to suitors in all diversity cases involving the jurisdictional amount, we can discern in its action no recognition of a policy which would exclude cases from the jurisdiction merely because they involve state law or because the law is uncertain or difficult to determine. The decision of this case is concerned solely with the extent of the liability of the City on its Refunding Bonds. Decision here does not require the federal court to determine or shape state policy governing administrative agencies. It entails no interference with such agencies or with the state courts. No litigation is pending in the state courts in which the questions here presented could be decided. We are pointed to no public policy or interest which would be served by withholding from petitioners the benefit of the jurisdiction which Congress has created with the purpose that it should be availed of and exercised subject only to such limitations as traditionally justify courts in declining to exercise the jurisdiction which they possess. To remit the parties to the state courts is to delay further the disposition of the litigation which has been pending for more than two years and which is now ready for decision. It is to penalize petitioners for resorting to a jurisdiction which they were entitled to invoke, in the absence of any special circumstances which would warrant a refusal to exercise it."

"Erie R. Co. v. Tompkins, supra, **did not free the federal courts from the duty of deciding**

> **questions of state law** in diversity cases. Instead it placed on them a greater responsibility for determining and applying state laws **in all cases within their jurisdiction** in which federal law does not govern." (Emphasis Supplied).

The judgment was reversed and the cause remanded to the Circuit Court of Appeals for further proceedings in conformity with the Supreme Court's opinion; in other words, to adjudicate the questions involved without regard for the Andrews case.

Therefore, it must follow that the doctrine of the Erie R. Co. v. Tompkins case does not preclude the Federal Courts from arriving at a determination of the instant cases **independently and contrary to the decision of the State Supreme Court.**

While the District Court case No. 1825-M-Civil, which was subsequently, by order entered December 16, 1948 (Supp. R 965), consolidated with the District Court case No. 1861-M-Civil, which cases so consolidated are now the subject of the present petition for writ of certiorari, was pending in the District Court. The Defendant there, Petitioner, filed its motion for leave to file second amendment to its answer with exhibits (Supp R 113-146). Among the exhibits contained in the amendment here, the audits made by Certified Public Accountant Lohmann for the fiscal years 1941-1942, 1942-1943, 1943-1944 and 1944-1945. Thereafter, on March 19, 1947, motion for leave to file a further amendment to the answer was made (Supp R 201-203). Neither of these motions was ever passed upon by the District Court; however, the Court of Appeals mentioned these proposed amendments in its decision reported in 164 F. 2d 430, 433, saying:

"We think the amendments ought to be allowed and the case tried on its merits".

The amendments referred to were never allowed. However, it is elementary that if the proposed amendments in case No. 1825-M-Civil tendering the Lohmann audits to support the defenses proposed should have been allowed, it must follow that the portions of the answer in case No. 1861-M-Civil relating to and setting forth the same audits with others, the approval thereof by courts of competent jurisdiction and alleging the payment of rent in accordance with the computations revealed by those audits which had been accepted by the landlord-respondents were proper and should not have been stricken. They contained the very essence of the defense interposed by the Defendant and by striking them at so early a stage in the case, it must clearly appear that the District Judge prematurely closed his mind to the defenses tendered by the answer and his refusal to restore those portions of the answer (R 281) must evidence a refusal of the District Judge to open his mind in that respect.

Specification of Error No. 5

The specification of error No. 5 is directed to the action of the Court of Appeals in denying the Petition's petition for rehearing.

The Petition for Rehearing clearly directed the atteition of the Court of Appeals to its misinterpretation of facts appearing of record. That petition called the appellate court's attention forcibly to the fact that in each case cited by it to support its position, the prior adjudication was not pleaded in subsequent cases as an estoppel, and

relied upon by the party entitled to do so. Those cases clearly are not applicable to the facts existing here since as has been noted, the prior adjudication in this case was pleaded, admitted, proven and relied upon throughout in the case No. 87418.

Additionally, it must appear that the Court of Appeals in rendering its decision of February 27, 1950 failed to recognize the fact that the judgment in the case No. 87418 had been "affirmed in part and reversed in part, with directions that decree be entered in accordance with" that opinion (R 989) and that no such decree had been entered until long after the entry of the final decree of December 2, 1948 which is the final decree complained of in this case, whereas the decree alleged in the Bill of Complaint and sued upon by the respondnts is a decree which was appealed from and referred to by the Supreme Court of Florida in its opinion filed January 25, 1946 (R 991). It was this decree (R 233) which was the basis for the claims laid by the respondents against the Petitioner in the Bill of Complaint, paragraphs 7, 8 and 9 (R 5-6), this being the cause of action which the Plaintiff required the Defendant to respond to and which alleged decree is pleaded in the Bill of Complaint in this cause, to no better effect than the decree in case No. 71067 and the judgment of the District Court in case No. 680-M-Civil were pleaded by the Petitioner in its Bill of Complaint in the case No. 87418 (R 975-976). Furthermore, the Court of Appeals refused to notice that in its own opinion upon an appeal in the District Court case No. 680-M-Civil, the same Court of Appeals recognized the decree in chancery case No. 71067 and the summary judgment in District Court case No. 680-M-Civil as res judicata of the issue there involved, using the language following:

"Almost a year later on a motion for summary judgment it appeared that Deauville Corporation had lost its litigation in the State Courts, **and that judgment there was res judicata of the issues in the federal court,** and that the case in the federal court should be dismissed; but whether with prejudice or not was held open to await the result of a possible appeal of the State Court case. Doggett then insisted that the Court had never finally passed on his claim for fees, which he asserted was not affected by the adverse decision in the State court, and he again prayed that his services prior to his dismissal be valued and required to be paid. The court held that the result of the litigation in the State court, **now completely final,** prevented any recovery in the federal court." (Emphasis supplied). Doggett v. Deauville Corporation, et al., 148 F. 2d 881, 882. (C.C.A., 5th Cir. No. 11231, April 17, 1945, affirming Holland, J.)

It must follow, therefore, that the Court of Appeals has erred as grievously as did the District Court in that each of them failed and refused to heed their own prior judgments involving the issues in this later case.

Respectfully Submitted,

A. FRANK KATZENTINE

Attorney for Petitioner
924 duPont Building
Miami 32, Florida

FILED
AUG 10 1950

SUPREME COURT OF THE UNITED STATES

OCTOBER 1950 TERM

No. 166

GARDEN SUBURBS GOLF AND COUNTRY CLUB, INC.,

Petitioner,

v.

JOHN M. MURRELL and D. H. REDFEARN, as Receivers of Deauville Corporation,

Respondents.

Brief of Respondents In Opposition to Petition for Writ of Certiorari

---

R. H. FERRELL,
1522 duPont Building,
Miami, Florida,

Counsel for Respondents.

CHARLES DANTON,
605 Lincoln Road,
Miami Beach, Florida,

Of Counsel for Respondents.

INDEX

Page

STATEMENT OF THE CASE 1

ARGUMENT 4

TABLE OF CASES

American Bar Association Journal, January 1949 (Article 6) Vol. 35, pp. 19-22 10

Caldwell, Governor, etc. v. Massachusetts Bonding & Insurance Co., 158 Fla. 677, 29 So. 2d 694 (2, 4, 5) 6

Dimock v. Revere Copper Company of Boston, Massachusetts, 117 U. S. 559, 29 L. ed. 994 7

Donald v. J. J. White Lumber Co., 65 Fed. 2d 441 7

Dowell v. Applegate, 152 U. S. 327, 38 L. ed. 463 7

Erie Railroad Company v. Tompkins, 304 U. S. 64, 82 L. ed. 1188 10

"Erie v. Tompkins in Retrospect, by John H. Parker, Chief Judge, United States Court of Appeals for the Fourth Circuit" 10

Garden Suburbs Golf & Country Club, Inc. v. Pruitt, 156 Fla. 825, 24 So. 2d 898 2

Guaranty Trust Company of New York v. York, 326 U. S. 99, 89 L. ed. 2079 10

Horse Creek Coal Land Company v. Anderson, et al., 266 Fed. 477 7

TABLE OF CASES—(Continued)

Page

Jackson Grain Co. et al. v. Lee, State Comptroller, 150 Fla. 232, 7 So. 2d 143, 144 (2) 6

James Bryan, Jr., et al. v. Campbell, 177 U. S. 649, 44 L. ed. 926 7

Killiher et al. v. Stone & Webster, Inc., 175 Fed. 2d 331, 333 6

Layne v. Bowler Corporation v. Western Well Works, Inc., et al., 261 U. S. 387, 67 L. ed. 712 5

McGregor v. Provident Trust Co. of Philadelphia, 119 Fla. 718, 162 So. 323 (2, 3) 6

Ruhlin v. New York Life Ins. Company, 304 U. S. 202, 82 L. ed. 1290 10

Southern Power Company v. North Carolina Public Service Company, 263 U. S. 508, 68 L. ed. 413 5

SUPREME COURT OF THE UNITED STATES

OCTOBER 1950 TERM

No. 166

GARDEN SUBURBS GOLF AND COUNTRY CLUB, INC.,

Petitioner,

v.

JOHN M. MURRELL and D. H. REDFEARN, as Receivers of Deauville Corporation,

Respondents.

Brief of Respondents In Opposition to Petition for Writ of Certiorari

---

STATEMENT OF THE CASE

This suit was instituted in the District Court, on December 12, 1946, by the landlord, respondent, against the tenant, petitioner, to collect the rents due (R. 1-7) under the terms of a lease on a hotel on Miami Beach, Florida. This lease provided that rent should be computed on a percentage basis of the gross receipts of the business conducted by the tenant on the premises, (R. 7-11) the items of which gross receipts had been enumerated with particularity in what is commonly called the "Hunt" decree, entered by the Circuit Court of Dade County, Florida, on August 18, 1945,

in chancery cause number 87,418, filed by petitioner against respondents and instituted for the particular purpose of having determined, once and for all, the items to be enumerated in such gross receipts (R. 971-981). The items thus decreed as the ones to be included in said gross receipts were approved by the Supreme Court of Florida, on appeal from the decree by the petitioner.

GARDEN SUBURBS GOLF & COUNTRY CLUB, INC. v. PRUITT, 156 Fla. 825, 24 So. 2d 898.

In said suit, chancery number 87,418, it was alleged by petitioner, the tenant, that it had been annoyed by the institution of various suits by respondent, the landlord, such as chancery number 71,067, filed in the Circuit Court of Dade County, Florida, on or about September 23, 1941 (R. 37, 87, 104) in which what is commonly called the "Wiseheart" decree was entered on April 27, 1944 (R. 125-135), and which involved the terms, conditions, and stipulations of said lease and that it was entitled to have declared and decreed judicially the items and character of income which constituted the gross receipts within the purview and meaning of said lease which were the basis upon which the percentage rental was to be computed (R. 978-979).

By the prayer of said bill, number 87,418, the tenant asked that the Circuit Court of Dade County determine the items of income of said hotel which should be included in the gross receipts going to make up the basis upon which the percentage rental was to be computed (R. 979-980). A final decree was entered by said court in which it was determined and specified with particularity the items to be included in such gross receipts (R. 233-241). The tenant appealed from the decree to the Supreme Court of Florida, and said court, by its opinion, affirmed said decree in all material matters and particularly in respect

to the items to be included in the gross receipts upon which the percentage rental was to be computed (R. 991-998).

Nevertheless, the tenant by its 225 page answer filed in the district court in this case (R. 20-247) recited the history and the allegations in the pleadings of the various suits in which it had been involved with the landlord wherein the rent on the hotel was an issue and sought to have the district court allow it for a second time to relitigate the same identical questions involved in the above mentioned chancery suit number 87,418 filed in the Circuit Court of Dade County, Florida, which had been decided adversely to it.

The landlord, respondent, filed a motion to strike all the material allegations of the answer in this case except those contesting the amount due (R. 249-260). The court sustained this motion (R. 265-266, 281-282). Thereupon the cause was referred to a master to take testimony and make a report of his findings (R. 282). The master filed his report (R. 316-339). This report shows extensive hearings were held, numerous reports examined, and testimony of certified public accountants was taken. From the evidence offered by the parties the master found that under the decree of the Circuit Court of Dade County, Florida, in Chancery cause number 87,418, which adjudicated the items and character of income which constitutes the gross receipts within the purview and meaning of said lease, the tenant, petitioner, was still indebted to the landlord, respondent, in the sum of $81,949.42 (R. 339). The tenant and the landlord, respectively, filed objections to the master's report (tr. 680, 702), and each in turn was denied (R. 943). Thereupon, the court entered a final judgment in which the master's report was approved and confirmed in all respects (R. 943) and the landlord, re-

spondent, was awarded the sum of $81,949.42. From this judgment the tenant, petitioner, appealed to the court of appeals, which court affirmed the judgment of the lower court (R. 1350).

ARGUMENT

Under Rule 38(5) of this court a review on writ of certiorari is not a matter of right but lies within the sound discretion of the court and under the provisions of said rule it will be granted only where there are **specific and important reasons therefor.** The questions presented do not lie within the provisions of subdivision (a) of paragraph 5 of said rule 38 because no federal question is involved. Neither does it fall within subdivision (c) of said paragraph 5 as it does not arise out of the District Court of Columbia. The questions presented must fall within the provisions of section (b) of said paragraph 5 if they are to be considered by this court. Under the provisions of section (b) a writ of certiorari may issue where a court of appeals has rendered a decision in conflict with the decisions of another court of appeals on the same matter; or has decided an important question of local law in a way probably in conflict with applicable local decisions; or has so far departed from the accustomed and usual course of judicial proceedings, or so far sanctioned such a departure of a local court, as to call for an exercise of the Supreme Court's power of supervision. None of these is involved. It may also issue where a court of appeals has decided an important question of federal law which has not been but should be settled by this court; or has decided a federal question in a way probably in conflict with applicable decisions of this court as provided in said section (b), but neither of these is germane to the questions presented, because no federal question is involved.

So, in the language of Justice Taft, in the case of

LAYNE v. BOWLER CORPORATION, petitioner v. WESTERN WELL WORKS, INC., et al., 261 U. S. 387, 393, 67 L. ed. 712, writ of certiorari cannot be granted in this case because it appears upon the face of the record that it does not involve "principles the settlement of which is of importance to the public as distinguished from that of the parties, and that there is no real and embarrassing conflict of opinion and authority between the circuit courts of appeal." We allege, as stated by Justice Taft, that "the present case certainly comes under neither head."

Petitioner does not seek redress through the remedy of writ of certiorari. It is seeking a remedy by appeal as the petition and the brief constitute a review of the whole case on its merits. Petitioner actually takes the position that the evidence was not sufficient to justify the judgment entered against it. This is not a matter that the court will consider upon a writ of certiorari.

SOUTHERN POWER COMPANY v. NORTH CAROLINA PUBLIC SERVICE COMPANY, 263 U. S. 508, 68 L. ed. 413.

Petitioner seeks to have this court review the holding of the district court and the circuit court of appeals to the effect that the decision of the Supreme Court of Florida in the case of Garden Suburbs Golf & Country Club, Inc. v. Pruitt, supra, a case between the same parties to this cause, was a bar in all future actions between the same parties on all matters which were actually and directly in issue in that court and there judicially passed on and determined. The Supreme Court of Florida, the federal courts, and the Supreme Court of the United States have held that when once a claim has been presented to a court of competent jurisdiction and decided on its merits, the parties have had their day in court and that cause of action has gone.

McGREGOR v. PROVIDENT TRUST CO. OF PHILADELPHIA, 119 Fla. 718, 162 So. 323 (2, 3);

JACKSON GRAIN CO. et al. v. LEE, State Comptroller, 150 Fla. 232, 7 So. 2d 143, 144 (2);

CALDWELL, Governor, etc. v. MASSACHUSETTS BONDING & INSURANCE CO., 158 Fla. 677, 29 So. 2d 694 (2, 4, 5);

KILLIHER et al. v. STONE & WEBSTER, INC., 75 Fed. 2d 331, 333.

The district court, in its judgment, stated that respondent in this case was relying upon the construction of the lease by the Supreme Court of Florida in case number 87,418, and that petitioner was not privileged to rely upon the early case number 71,067 in order to absolve itself from the interpretation given the lease by the Supreme Court of Florida in a case which it, the petitioner, instituted (R. 281-282).

Petitioner now contends, as it did before the court of appeals, that the final decree on the merits entered by the state court in case 87,418 making a determination and specifying with particularity the items to be included in gross receipts, affirmed by the Supreme Court of Florida, adopted by the district court as the measure for determining such gross receipts and affirmed by the court of appeals is still not the law of the case and should be reviewed by this court. This cannot be done, for by the filing by petitioner of chancery cause number 87,418 in which the "Hunt" decree was entered, on a day subsequent to the entry of the "Wiseheart" decree in chancery number 71,067, petitioner showed and confessed that it did not rely on the "Wiseheart" decree and thereby waived it and it cannot assert it in this present case even though it might

have set out at the time that it was entered the measure of the gross receipts.

If petitioner was the instrumentality through which conflicting judgments were entered in respect to the matters before the district court and reviewed by the circuit court, the circuit court was bound by the last judgment in point of time which was the "Hunt" decree and which decree is binding upon this court.

> DONALD v. J. J. WHITE LUMBER CO., 65 Fed. 2d 441;
>
> DIMOCK v. REVERE COPPER COMPANY OF BOSTON, MASSACHUSETTS, 117 U. S. 559, 29 L. ed. 994;
>
> DOWELL v. APPLEGATE, 152 U. S. 327, 38 L. ed. 463;
>
> HORSE CREEK COAL LAND COMPANY v. ANDERSON, et al., 266 Fed. 477;
>
> JAMES BRYAR, JR., et al. v. CAMPBELL, 177 U. S. 649, 44 L. ed. 926.

The record reveals no pleadings whatsoever filed in case number 71,067 wherein the "Wiseheart" decree was entered that even suggests an action for the construction of the lease or the determination of a formula for ascertaining the items or character of the receipts going to make up the gross receipts. In all of the litigation referred to by petitioner in its petition and brief, none ever involved the questions propounded in chancery cause number 87,418 wherein the "Hunt" decree was entered except the case now before this Court. The decree in case number 71,067 was not repugnant to nor in conflict with any of the provisions of the decree entered in case number 87,418. The issues attempted to be made by petitioner in its answer in this present case were not raised in chancery

cause 71,067 nor in case number 680-M-Civil filed in the District Court of the United States, which were actions for rent by the landlord for particular years of the term.

When petitioner filed case number 87,418 in the Circuit Court of Dade County, Florida, and alleged that because of various suits instituted by respondent against it involving the interpretation of the lease on the property involved in this case, it was entitled to and "should be afforded relief from harassing and annoying suits and litigation allegedly involving said indenture of lease, and the terms, conditions and stipulations thereof, and the insecurity and uncertainty with respect to plaintiff's rights, status and obligation under said indenture of lease, and that the plaintiff is entitled to have its rights, status and obligations under said indenture of lease judicially declared and determined, and that it is necessary that this court take jurisdiction of the parties hereto, and the subject matter hereof, and ascertain, construe, determine and decree the true and proper construction of said indenture of lease, and matters, items and character of income that constitute gross receipts, within the purview and meaning of said indenture of lease, and upon which rental percentages should be computed and paid" (R. 978, 979), the district court was correct in entering its decree and holding that petitioner was bound by the construction of the lease as made in that case by the Circuit Court of Dade County, Florida, and affirmed by the Supreme Court of Florida, in Garden Suburbs Golf & Country Club, Inc. v. Pruitt, supra, which case was instituted as aforesaid by petitioner and commonly referred to in these proceedings as the "Hunt" case, chancery number 87,418 Circuit Court of Dade County, Florida (R. 943-944).

The only real question before the court of appeals was whether or not the district court was correct in holding that petitioner was estopped by the judgment entered by

the Circuit Court of Dade County, Florida, in said case number 87,418 and affirmed by the Supreme Court of Florida, and would not be permitted to relitigate the matters which had been adjudicated in said case number 87,418. The court of appeals held that it was bound by the construction of the lease as adjudicated in said case number 87,418 and affirmed by the Supreme Court of Florida.

The Supreme Court of Florida having declared the "Hunt" decree as the law of the contract of lease under which this litigation arose and the law there declared having been applied by the district court in this case between the same parties and the court of appeals having affirmed the judgment of the district court, there is no alternative but for the Supreme Court of the United States to apply it and deny this petition for certiorari.

Petitioner attempts to come within the rule under which the writ of certiorari may be granted by contending that it is entitled to a judgment clarifying the "confused status of the applicable law of Florida. It expressed doubt as to what the Florida law, applicable to the facts presented, now is or will be declared to be." (Petitioner's brief p. 27). Statements which are not based upon fact are of no value. There is no confused status of the applicable law of Florida in regard to the interpretation of the lease in question. The Supreme Court of Florida has stated in no uncertain terms what the law of the contract of lease is. (Garden Suburbs Golf & Country Club, Inc. v. Pruitt, supra). That judgment is res judicata and constitutes an estoppel by judgment as to the said formula for determining the gross receipts in a second suit between the same parties in the federal court brought by respondent to recover the rents claimed to be due under the construction given said lease by the Supreme Court of Florida.

ERIE RAILROAD COMPANY v. TOMPKINS, 304 U. S. 64, 82 L. ed. 1188;

RUHLIN v. NEW YORK LIFE INS. COMPANY, 304 U. S. 202, 82 L. ed. 1290;

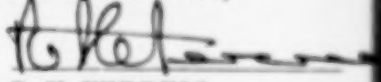
GUARANTY TRUST COMPANY OF NEW YORK v. YORK, 326 U. S. 99, 108, 89 L. ed. 2079;

"ERIE v. TOMPKINS IN RETROSPECT, by John H. Parker, Chief Judge, United States Court of Appeals for the Fourth Circuit."

AMERICAN BAR ASSOCIATION JOURNAL, January 1949 (Article 6) Vol. 35, pp. 19-22.

Inasmuch as the petition and brief do not present a single question that involves principles, the settlement of which is important to the public as distinguished from that of the parties, and inasmuch as the said petition and brief do not present a single question which involves a real and embarrassing conflict of opinion and authority between courts of appeal of the United States, the petition for writ of certiorari should be denied.

Respectfully submitted,



R. H. FERRELL,
1522 duPont Building,
Miami, Florida.
Counsel for Respondents.

CHARLES DANTON,
605 Lincoln Road,
Miami Beach, Florida,
Of Counsel for Respondents.